Hollinger Corp.
pH 8.5

Hon. J. A. Garfield.
With Compliments of
M. D. Leggett.

BEFORE THE

Congress of the United States.

ON THE PETITION OF

JOHN C. BIRDSELL,

For an Act authorizing the Commissioner of Patents to hear and determine his Application for Extension of his Letters-Patent for

MACHINERY for HULLING and THRESHING CLOVER.

ARGUMENT FOR THE PETITIONER.

By WELLS W. LEGGETT,
His Attorney.

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Hon. MONTGOMERY BLAIR,
Hon. M. D. LEGGETT,
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ON THE

PETITION OF JOHN C. BIRDSELL,

FOR AN

Act to authorize the Commissioner of Patents to hear and determine his Application for an Extension of his Letters-Patent for Machinery for Hulling and Threshing Clover.

ARGUMENT FOR THE PETITIONER.

This is a petition for an act to confer upon the Commissioner of Patents the power to consider an application for an extension of a patent, in all respects similar to the power he exercised under the act of July 8, 1870.

That act provides for a publication of notice of the application for sixty days; also, for a thorough investigation as to the novelty and originality of the invention; for the regular examination and cross-examination of witnesses in case of opposition; and for a full hearing as to the novelty, utility, and propriety of the extension in respect to the public interests, and whether or not the inventor, after having used proper diligence, had been sufficiently remunerated.

The sections of the act relating to extensions are as follows:

REVISED STATUTES.

SEC. 4924. Where the patentee of any invention or discovery, the patent for which was granted prior to the second day of March, eighteen hundred and sixty-one, shall desire an extension of this patent beyond the original term of its limitation, he shall make application therefor in writing to the Commissioner of Patents, setting forth the reasons why such extension should be granted; and he shall also furnish a written statement under oath of the ascertained value of the invention or discovery, and of his receipts and expenditures on account thereof, sufficiently in detail to exhibit a true and faithful account of the loss and profit in any manner accruing to him by reason of the invention or discovery. Such application shall be filed not more than six months nor less than ninety days before the expiration of the original term of the patent; and no extension shall be granted after the expiration of the original term.

SEC. 4925. Upon the receipt of such application and the payment of the fees required by law, the Commissioner shall cause to be published in one newspaper in the city of Washington, and in such other papers published in the section of the country most interested adversely to the extension of the patent as he may deem proper, for at least sixty days prior to the day set for hearing the case, a notice of such application, and of the time and place when and where the same will be considered, that any person may appear and show cause why the extension should not be granted.

SEC. 4926. Upon the publication of the notice of an application for an extension, the Commissioner shall refer the case to the principal examiner having charge of the class of inventions to which it belongs, who shall make the Commissioner a full report of the case, stating particularly whether the invention or discovery was new and patentable when the original patent was granted.

SEC. 4927. The Commissioner shall, at the time and place designated in the published notice, hear and decide upon the evidence produced both for and against the extension; and if it shall appear to the satisfaction of the Commissioner that the patentee, without neglect or fault on his part, has failed to obtain from the use and sale of his invention or discovery a reasonable remuneration for the time, ingenuity, and expense bestowed upon it, and the introduction of it into use, and that it is just and proper, having due regard to the public interest, that the term of the patent should be extended, the Commissioner shall make a certificate thereon, renewing and extending the patent for the term of seven years from the expiration of the first term. Such certificate shall be recorded in the Patent Office; and thereupon such patent shall have the same effect in law as though it had been originally granted for twenty-one years.

The Patent Office rules of practice under the act read as follows:

RULES.

71. Any person may oppose an application for extension, but must give notice of such intention to the applicant or his attorney of record within the time hereafter named, and furnish him with a statement of his reasons of opposition. After this he will be regarded as a party in the case, and will be entitled to notice of the time and place of taking testimony, to a list of the names and residences of the witnesses whose testimony may have been taken previous to his service of notice of opposition, and to a copy of the application and of any papers on file, upon paying the cost of copying. He must also immediately file a copy of such notice and reasons of opposition, with proof of service of the same, in the Patent Office.

If the extension is opposed on the ground of lack of novelty in the invention, the reasons of opposition should contain a specific statement of any and all matter relied upon for this purpose.

72. The applicant for an extension must furnish to the Office a statement, in writing, under oath, of the ascertained value of the invention, and of his receipts and expenditures on account thereof, both in this and foreign countries. This statement must be made particular and in detail, unless sufficient reason is set forth why such a statement cannot be furnished. It must *in all cases* be filed with the petition. No exceptions will be made to this rule.

Such statement must also be accompanied with a *certified abstract of title and* a declaration, under oath, setting forth the extent of applicant's interest in the extension sought.

73. The questions which arise on each application for an extension are—

First. Was the invention *new* and *useful* when patented?

Second. Is it *valuable* and *important to the public*, and to what extent?

Third. Has the inventor been *reasonably remunerated* for the time, ingenuity, and expense bestowed upon it, and the introduction of it into use? If not, has his failure to be so remunerated arisen from neglect or fault on his part?

Fourth. What will be the effect of the proposed extension upon the public interests?

No proof will be required from the applicant upon the first question, unless the invention is assailed upon those points by opponents.

To enable the Commissioner to come to a correct conclusion in regard to the second point of inquiry, the applicant must, if possible, procure the testimony of persons disinterested in the invention, which testimony should be taken under oath. *This testimony must distinguish carefully between the specific devices covered by the claims of the patent and the general machine in which those devices may be incorporated.*

In regard to the third point of inquiry, in addition to his own oath, showing his receipts and expenditures on account of the invention, the applicant must show, by testimony under oath, that he has taken all reasonable measures to introduce his invention into general use; and that, without neglect or fault on his part, he has failed to obtain from the use and sale of the invention a reasonable remuneration for the time, ingenuity, and expense bestowed on the same, and the introduction of it into use.

74. In case of opposition to the extension of a patent by any person, both parties may take testimony, each giving reasonable notice to the other of the time and place of taking said testimony, which shall be taken according to the rules hereinafter prescribed.

75. Any person desiring to oppose an extension must serve his notice of opposition, and file his reasons therefor, at least ten days before the day fixed for the closing of testimony; but parties who have not entered formal opposition in time to put in testimony, may, at the discretion of the Commissioner, be permitted to appear on the day of hearing, and make argument upon the record in opposition to the grant of the extension. But in such case good cause for the neglect to make formal opposition must be shown.

76. In contested cases no testimony will be received, unless by consent, which has been taken within thirty days next after the filing of the petition for the extension.

77. Service of notice to take testimony may be made upon applicant, upon the opponent, upon the attorney of record of either, or, if there be no attorney of record, upon any attorney or agent who takes part in the service of notice, or in the examination of the witnesses of either party. Where notice to take testimony has already been given to an opponent, and a new opponent subsequently gives notice of his intention to oppose, the examination need not be postponed, but notice thereof may be given to such subsequent opponent by mail or by telegraph. This rule, however, does not apply to *ex-parte* examinations, or those of which no notice has been given when notice of opposition is served.

78. In the notice of the application for an extension a day will be fixed for the closing of testimony, and the day of hearing will also be named. Application for a postponement of the day of hearing, or for further time for taking testimony, must be made and supported according to the same rules as are to be observed in other contested cases; but they will not be granted in such a manner as to cause a risk of preventing a decision prior to the expiration of the patent. Immediately upon the closing of the testimony the application will be referred to the ex-

aminer in charge of the class to which the invention belongs for the report required by law; and said report shall be made not less than five days before the day of hearing. As this report is intended for the information of the Commissioner, neither the parties nor their attorneys will be permitted to make oral arguments before the examiner. In contested cases briefs are deemed desirable, and these should always be filed at least five days before the day of hearing.

These are followed by stringent rules, from 113 to 118, for taking and transmitting testimony.

There is no principle of law involved in this matter. It is simply a question of fact whether the patentee has, without fault or neglect on his own part, been deprived of the benefits of the grant made to him by the Government. And if through no fault of his own, the patentee has met with such insurmountable obstacles and circumstances as not to have derived any adequate remuneration for an invention which has greatly benefited the public, Congress has uniformly either granted to him an additional term or authorized him to apply to the Commissioner, in order that upon a proper showing under the law he might be given an extended term.

Hence, in order to secure the requisite enactment, it is only necessary to show to Congress that the facts are such, if established before the Commissioner, as to warrant such an extension.

What are the Facts?

1. *That the device was novel and useful* is shown by the grant itself, by the reissue in 1862, by the extension in 1872, and by the decree of the United States Circuit Court, Justice Swayne presiding, after a long and exhaustive contest with infringers.

2. *The utility of the invention is shown also by these striking facts.* Before the invention clover was gathered in the field, or the heads were detached from the stems in the field by a stripper; afterwards the seed was trampled or flailed out on the barn floor; the heads and chaff were then bolted to remove the stems that were not readily raked out, and the mass afterwards passed through a huller to get out and clean the seed;—three or four distinct operations, requiring several

handlings, many assistants, and much time and labor. Birdsell then made his machine, which did the whole work of threshing from the long straw, separating the straw from the heads, hulling, cleaning, and gathering the seed all at one single operation. *The cost of getting out the seed was thereby reduced one to two dollars a bushel.* The benefits to the country were incalculable. It brought clover-seed within the range of all farmers, rich and poor alike. The reduction in price increased the number of customers, and a great clover-seed-producing industry was established in various sections of the country. Farmers generally, who before could not afford it, could afterwards purchase seed to sow, and after gathering a profitable crop of seed turn under the clover to renew and recuperate the soil, and it is now the general custom to sow clover for this purpose once in three or five years in the rotation of crops. Clover, consequently, is now recognized as the cheapest and most universally-used fertilizer.

3. *The inventor, the patentee, has not derived any remuneration for his invention, nor for his time, ingenuity, and expense bestowed upon it, and his efforts to introduce in into public use.*

This is established fully by the account submitted in Mr. Birdsell's sworn petition, the affidavits of his sons, of his banker, his indorsers, and others.

Petition.
Affidavit.—J. B. Birdsell.
" B. A. Birdsell.
" Geo. W. Glover.
" Miller, Stanfield, and others.

The account submitted shows that his expenditures on account of the patent have exceeded his receipts from the same source about $73,809.

Yet it has been the uniform practice to reward the inventor by an extension, even though a handsome profit has been derived, (but where the invention has been of great value and importance to the public,) as instanced by the following cases that came before the Commissioner of Patents:

May 5, 1869..	Brown, Seed-planter	Profits	$30,000.	Extended.
Dec. 1, 1870..	Woodruff, Car-seats.....	"	20,000.	"
Dec. 10, 1870..	Wright, Upholstery springs.	"	30,000.	"
Dec. 15, 1870..	Kingsland, Paper-pulp.....	"	5,000.	"
Dec. 16, 1870..	Goodell, cutting veneers.....	"	6,145.	"
June 24, 1871..	Lowthrop, Bridges, worth to the public but $50,000 to $70,000, realized.....	"	20,000.	"
Oct. 9, 1871..	Towne, Chain-machine	"	9,853.44	"
M'ch 10, 1873..	Putnam, Cork-fastener.....	"	21,000.	"
July 27, 1872..	H. & F. Blandy, Engine.....	"	9,000.	"
Aug. 20, 1872..	Waterman, tempering wire.	"	35,000.	"
Dec. 24, 1873..	Sturtevant, Veneer-cutter...	"	50,000.	"
Jan. 20, 1873..	Lewis, Horse-shoe machine.	"	5,000.	"
June 3, 1874..	Fuller, Tuck-marker—profit $73,000, and $43,000 for his time; total.....	"	116,000.	"

4. *The failure to derive remuneration was through no fault of his own.* His exertions have been unparalleled, and the obstacles, the aggravations, the conspiracies have been insurmountable within the time limited, and without precedent in the history of inventions.

His patent was in the agricultural line, and had its birth in 1858, in the midst of the great financial embarrassments which convulsed the country, and so disastrously affected all the agricultural, and especially the manufacturing, interests throughout the land.

At the outset manufacturers of other agricultural implements, with their agents, had the field, and he had to come in direct competition with them everywhere. His machines were necessarily expensive, and it was easy for such parties to deter farmers and others from purchasing his new and untried invention. He exhibited it at numerous State and county fairs, at great expense. He was making some machines, but his debts were already harassing him. In April, 1864, his office at Henrietta, New York, was fired, destroying his books and accounts, and partially destroying the building. In August, 1864, his whole store-house at Henrietta was fired and destroyed, burning up his tools, machinery, stock, &c., and destroying twenty-three machines and over fifty frame-works. This property was his security,

upon the strength of which he had founded a business credit that had enabled him to struggle along against debts and the vicissitudes of business. Finding the business so difficult at Henrietta, he moved his family and part of his property to South Bend, Indiana; but in April, 1865, he suffered great loss again by the burning of the balance of his books and accounts at the St. Joseph Hotel fire at South Bend. Then again in September, 1867, his office-books and accounts were all destroyed by fire.

The war followed within two or three years after the grant of his patent, and clover machines were not in demand. The whole attention of farmers was devoted to the raising of grain, and the devastation throughout the South and West after the war necessitated grain, and not clover, as the principal crop until 1867 and 1868. Infringers had sprung up, and in 1863 he was obliged to bring a suit against the St. Joseph Iron Company of Mishawauka, Indiana, wherein he obtained decree and injunction. He had to defend a two-year suit against him by E. W. Collins of Chili, New York, beginning in 1864. He pleaded his patent, and made other defenses, and the decree was again in his favor in 1866. In 1867 he had to sue Charles Whittaker of Chelsea, Michigan, for infringement, and won the suit and enjoined the defendant, but no account was taken.

Beginning with a general financial panic, crippled by the war, a victim of four fires, and necessarily a contestant in three suits for infringement, it is scarcely necessary to say that he was largely in debt; but the business picking up in 1869 and 1870, they deemed it advisable to borrow money, and tax their business credit to erect large works at South Bend in 1871, and did so. But he was already at the end of his patent, and in the beginning of 1872 he was obliged to seek an extension before the Commissioner. His troubles before that time were a mere bagatelle to what he encountered thereafter.

A powerful combination of infringers was formed to oppose his extension. This combination contributed equally to carry on the contest, and he was obliged to expend upwards of $12,500 before he finally succeeded in obtaining his extension.

The Commissioner decided in his favor, and extended his patent.

This same combination then assumed the rôle of a conspiracy to wrest the invention from the petitioner. They flooded the market with their machines, they cut down their prices, and sold machines on long time, and with disregard of the financial responsibility of the purchasers; in fact, anything to prevent the petitioner and his company from making sales, and to oblige them to carry their machines in the market unsold. They even went so far as to guarantee their machines against this identical patent sought to be extended, so as to induce purchasers, dealers, and agents to disregard Mr. Birdsell's rights, and pay no attention to his cautions and warnings against infringers.

Mr. Birdsell was obliged to bring suit against these infringers, and began in the United States Circuit Court for the northern district of Ohio by suing McDonald & Co., of Wooster, Ohio, and the Ashland Machine Company, of Ashland, Ohio. The combination, as stated in the petition, consisted of the defendants in the above two cases, McConnell, Raymond & Co., of Tecumseh, Michigan; Garr, Scott & Co., of Richmond, Ind.; Russell & Co., of Massillon, Ohio; Glen & Hall Manufacturing Company, of Rochester, N. Y.; George Westinghouse & Co., of Schenectady, N. Y.; and the Hagerstown Agricultural Implement Manufacturing Company, of Hagerstown, Maryland. This was an actual conspiracy, as shown by the testimony of the parties themselves in the Ohio cases. See testimony of Eugene Glen, of the Rochester Company, Ohio Record, p. 227:

Cross-Ques. 20. What persons, firms, or corporations, signified to you a desire to join the opposition to said application for said extension?

Ans. George Westinghouse & Co., Raymond, McConnell & Co., and Garr, Scott & Co. directly; and Messrs. Russell & Co., and Mr. David Whiting, through Garr, Scott & Co.

H. Raymond, of the Michigan Co. (O. R., p. 520.)

Cross-Q. 2. Do you or your firm contribute to the expenses of defending these suits?

Ans. We do.

Cross-Q. 3. What is your agreement in relation to that?

Ans. We agreed to join with the others in seeing the termination of this suit.

Cross-Q. 4. What proportion of the expenses do you pay?

Ans. Equal proportion with the others.

Cross-Q. 5. What others?

Ans. I don't know that I can remember them all; Garr, Scott & Co., Russell & Co., McDonald & Co., Whiting & Co., Jones & Miller, (of Hagerstown.) Westinghouse & Co., this is all I remember.

ANGUS MCDONALD, of the Wooster Co. (O. R., p. 329.)

Cross-Q. 95. Who besides your own firm are assisting in this litigation, or contribute to the expense thereof?

(Witness first refused, but finally answered.)

Ans. Hagerstown Agricultural Implement Manufacturing Company; McConnell, Raymond & Co., of Tecumseh, Michigan; Russell & Co., of Massillon; Garr, Scott & Co., Richmond, Indiana; G. Westinghouse & Co., Schenectady, New York. This suit and the one against the Ashland Manufacturing Company are being defended jointly by the same counsel, and of course that firm contributes to the expense.

The parties to this powerful combination contributed equally in money and means to the defense of the said Ohio suits. The boast was made that they would crush Mr. Birdsell with money, and would law him until his patent expired and until he was bankrupt.

(See affidavits of J. H. Baker, now Member of Congress from Indiana; also those of Glover, J. B. Birdsell, E. St. John, and B. A. Birdsell.)

They kept themselves informed of Mr. Birdsell's thickening embarrassments by a spy, one of Birdsell's office employés, and they knew, as that man stated, that Mr. Birdsell was deeply in debt and his bankruptcy was imminent, and with the hope and expectation of consummating his ruin they compelled him to an expenditure of about $65,000 before a decision was rendered in his favor by Justice Noah H. Swayne, in 1874; but the final decree was not made until 1877. In the meantime, he brought suit against all of the parties constituting the combination, and obtained injunctions against all of them; but he did not succeed in this until they had so flooded the market with their machines that there was no

demand for any more, and Mr. Birdsell had to close up his works during the whole of the seasons of 1873–'74–'75, and only sold a few machines that he had carried over, and others that had been partially constructed.

To add to his distress, the two companies he had sued and the Glen & Hall Co., one of the co-contributors, failed before final decree could be obtained, and made assignments, and Mr. Birdsell obtained nothing from them to relieve the enormous debt of over $130,000 with which he had become burdened.

It is a significant circumstance that the whole community at South Bend had become interested for Mr. Birdsell in his unequal fight against such an array of power, influence, and capital, and that when he finally obtained his decree at Cleveland, Ohio, and the news was telegraphed to South Bend, the popular sympathy in his behalf found vent in a general display of flags throughout the city, the ringing of bells, and the simultaneous blowing of their whistles by all the manufacturing establishments for half an hour.

It was greatly through the strong sympathy felt for Mr. Birdsell by the people among whom he lived, and the confidence inspired by his honest, persistent character, which gave him the credit that enabled him to carry on the contest. But while he had triumphed in the protracted litigation that had so touched the feelings of the whole community in which he lived, because it was known to be a life and death struggle of an honest and impoverished man against a most formidable organization bent on his destruction, the struggle was not over,—he had to resort to further litigation to derive any benefit from the triumph. His shops were closed. The market had been flooded with long-lived machines by his opponents. He could regain the market only by proceeding against those who were using the infringing machines to enjoin the use or compel payment for it. Under ordinary circumstances he would have been loath to pursue this course; but he had first sued and shut up all the manufacturers; had, in fact, driven them into bankruptcy, and therefore they had been unable to meet his claims or reimburse him for the great expenses of his litigation. Moreover, the

users had not purchased innocently, but they had purchased with their eyes open, upon guarantees against Mr. Birdsell's patent, electing to rely upon their guarantors. It was not until 1876, after Mr. Birdsell had brought several hundred such suits, that he did a reasonable business, which, being continued in 1877, enabled him to discharge a part of the immense debt which had accumulated during his long struggle.

But having at last gained a comparatively unmolested market, and being for the first time in the way of reaping some benefit from his invention, he has arrived at the end of the term of his patent, and will derive no advantage from his hard-fought-for rights, unless he be permitted to enjoy them by an extension of the patent.

The public cannot be injuriously affected by the grant of this extension. It is the policy of the law to encourage the development of the arts by granting to the inventor of a new and useful device, for a limited period, the exclusive right to his invention. See Justice Swayne's opinion, annexed to the petition:

"Inventors are a meritorious class of men. They are not monopolists in the odious sense of that term. They take nothing from the public. They contribute largely to its wealth and comfort. Patent laws are founded on the policy of giving to them remuneration for the fruits enjoyed by others of their labor and their genius."

The extension of this patent will not injuriously affect the price of the machines in the market. The machines are cumbersome and bulky; they require special machinery in their productions; and in order to sell them at their present figures, and with a fair margin, they must be manufactured as a specialty by an establishment organized to that end. This can only be done under the protection of a patent. Should the patent expire, such a specialty could not be supported; the manufacturer of machines would descend to the level of odd jobs at increased cost of production, while the enlarged commissions to agents, owing to competition, the proportionately greater expenses of advertising, &c., would unquestionably have the effect to increase rather than to reduce their

cost to the public and degrade the character of the workmanship. It is, therefore, not a question as between the patentee and the public, but only as between the patentee—who has given the best part of his life, his energies and his means to the invention, perfection, development, and introduction of the machines—and other manufacturers who have done nothing to effect those ends.

The testimony shows that Mr. Birdsell has not had the benefit of his invention except for the past and a part of the preceding year. From the time he succeeded in bringing it into notice, and its advantages became recognized, his invention was seized upon by a number of powerful manufacturing companies, who put more machines into the market than all he had been able to sell. Their operations were arrested only by the expenditure of more money than he had received for all he had built himself. It is only in the last years of the term for which the exclusive right was granted to him by the law, that his protection has become a reality. Nor is this due to any fault, or want of diligence, or want of determination on his part in the assertion of his rights. The multitude of suits instituted by him, and the vast sums expended in the prosecution of them by Mr. Birdsell, as well as the bankruptcy which he has visited upon the once powerful and wealthy companies which undertook to law him out of his rights, sufficiently indicate the patience, vigilance, and firmness with which he has maintained them.

This explains why he has not had the benefits which the law intended he should derive for the great mental and bodily labor he has given for the last twenty years to the invention, perfection, construction, and introduction of one of the most useful machines known to the farmer.

Respectfully,

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